Supreme Court, U.S.
FILED
SEP 4 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-209

In The
Supreme Court of the United States
October Term, 1987

SHERMAN COLLEGE OF STRAIGHT CHIROPRACTIC, *et al.*,

Petitioners,

v.

AMERICAN CHIROPRACTIC ASSOCIATION, INC., *et al.*,

Respondents.

NATIONAL BOARD OF CHIROPRACTIC EXAMINERS' BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTION PRESENTED

Is there any basis for granting review where both the district court and the court of appeals (1) concluded as a matter of law that the rule of reason applied to self-evidently non-horizontal alleged conduct of respondents, and (2) found as a matter of fact that none of the conduct alleged to have been engaged in by respondents had had any anti-competitive effect in any relevant market?

DESIGNATION OF PARTIES

The petitioners and respondents are identified in the caption appearing on the cover of the petition. The National Board of Chiropractic Examiners has no corporate parents, subsidiaries or affiliates.

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OPINIONS BELOW

The opinion of the court of appeals is reported at 813 F.2d 349, and the opinion of the district court is reported at 654 F. Supp. 716. Both opinions are reproduced in the appendix to the petition.

STATEMENT OF THE CASE

It is respectfully submitted that it is impossible to obtain any clear idea, from petitioners' statement of the case, where respondent National Board of Chiropractic Examiners ("NBCE") fits into this case. To rectify that, while avoiding repetition with other responses to the petition, the NBCE will set forth herein in capsule form the facts as established at trial which relate to the NBCE's participation in the fact situation which gave rise to the lawsuit.

The NBCE is a non-profit corporation established in the early 1960's. Its principal business is to prepare and administer a national examination for the purpose of testing the academic knowledge of students and graduates of chiropractic colleges. The national examination is given twice a year at testing sites throughout the United States, including petitioner Sherman College of Straight Chiropractic ("Sherman"), and in foreign countries. No other organization performs a similar service for the chiropractic profession.

Almost all states recognize the NBCE's examination and use the results as part of their licensing process, but it is a prerequisite for licensure in only four or five states; in all other states there is an alternative for testing academic knowledge as part of the licensing process.

Although the NBCE's principal source of revenue is the fees paid by those who take its examination, its real "customers" are the state boards, as it is they who must be kept satisfied. The continuing economic viability of the NBCE depends upon the state boards continuing to

recognize its national examination and use it as part of their licensing process; if they did not continue to do so, there would be no reason for chiropractic students and graduates to pay to take the NBCE's examination.

In 1974, when respondent Council on Chiropractic Education ("CCE") received official recognition as a chiropractic accrediting agency from the United States Office of Education, the only requirement for a chiropractic student or graduate to take the NBCE examination was a certification from his or her college. However, the recognition of the CCE by the United States Government was a highly significant event to the profession, and led to pressure on the NBCE from its customers—the state boards—to examine only students and graduates of CCE-accredited colleges. Dr. Webster (the President of the NBCE at the time of trial) explained:

> "I think it was generally the consensus of the examining boards with the raise [*sic*] in credentials if you will of the professional educational standards that the testing agency should also start elevating its testing standards and its eligibility requirements."

After increased pressure from the state licensing boards, in May 1978 the NBCE adopted the policy statement which gave rise to what appears to be the principal claim against it in this lawsuit. The policy statement provided that, starting with the March 1980 examination, the NBCE would examine

> "those applicants graduating from colleges which have officially adopted the standards of education set forth by a chiropractic accrediting agency recognized by USOE, and which have an active application before the accrediting agency."

Because Sherman had decided not to adopt the standards of education of the only chiropractic accrediting agency recognized by the USOE—the CCE—and did not have an application before that agency, the NBCE's policy statement, had it ever become effective, would have precluded Sherman students and graduates from taking the NBCE examination. No such result ever occurred, however. During the nearly two-year period between the adoption of the policy statement and its prospective effective date, the NBCE reconsidered its position and rescinded the policy statement, as a result of advice it had sought from the Federal Trade Commission, the United States Office of Education, and others.

Sherman's students and graduates have taken the NBCE examination every time it has been offered since Sherman had been in existence long enough for its first group of students to have completed sufficient course work to be prepared for the examination.

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REASONS FOR DENYING THE WRIT

I

THE DECISION OF THE COURT OF APPEALS AFFIRMING THE DISTRICT COURT'S APPLICATION OF THE RULE OF REASON TO THE CLAIMS AGAINST THE NBCE, AND AFFIRMING THE DISTRICT COURT'S FINDING OF LACK OF ANTI-COMPETITIVE EFFECT, CORRECTLY FOLLOWS THE TEACHINGS OF THIS COURT.

A. The Petition Misstates and Distorts the Holdings of the Courts Below.

It is important, in analyzing the petition, to realize that in many places it completely mischaracterizes the holdings of the courts below.

The petition seeks to persuade this Court that the courts below found a combination, a conspiracy, or a horizontal boycott, and then failed to apply the correct antitrust analysis to that conduct. Thus, the petition states at various places:

> "The lower court held in this Sherman Act conspiracy case that defendants' explicit combination to eliminate the petitioners . . . was not 'unreasonable' . . . ." (Pet., i)
>
> "Whether a horizontal agreement among dominant competitors to exclude other competitors . . . creating a concerted refusal to deal, is 'reasonable' . . . ." (Pet., ii)
>
> "Whether a private conspiracy among professionals to eliminate competition . . . is presumptively unreasonable . . . ." (*Ibid.*)
>
> "[I]n its final written order the court held that the defendants' conspiracy to boycott Sherman College from competing with the CCE accredited colleges had no anticompetitive effect." (Pet., 20)

"[T]he trial court held that the boycott had no anticompetitive effect . . . ." (Pet., 21)

"[T]he court held that the admitted combination was 'reasonable' . . . ." (Pet., 31)

"The lower court held that this intentional agreement . . . was not unreasonable . . . ." (Pet., 34)

The lower courts did not find a combination, a horizontal agreement, a private conspiracy, a conspiracy to boycott, a boycott, an admitted combination, or an intentional agreement. Those are figments of petitioners' imagination. The lower courts correctly avoided trying to pigeonhole the facts, and did not use, directly or indirectly, any such characterizations as petitioners now claim were utilized.

The point need not be belabored; the lower courts' opinions are perfectly plain on this point, and the petition is seriously misleading.

B. The Courts Below Correctly Held that the Rule of Reason Is Applicable to the Claims Against the NBCE.

In refusing to view the case against the NBCE as a horizontal one, the lower courts were surely right. When consideration is given to how the NBCE fits into the chiropractic profession, it is clearly seen that it does not have a horizontal relationship with *any* of the petitioners or respondents:

—The NBCE is not involved in any aspect of the process of the accreditation of chiropractic colleges, and therefore does not compete with, or act in the same market as, respondent CCE or petitioner SCASA;

—The NBCE is not involved in any aspect of teaching chiropractic, and therefore does not compete in any way with, or act in the same market as, any of the colleges in the CCE, or with Dr. Williams or his college, or with Sherman;

—The NBCE is not in any sense a trade association of chiropractors, and therefore does not compete in any way with, or act in the same market as, respondent ACA;

—The NBCE does not practice chiropractic, and therefore does not compete with, or act in the same market as, any of the individual members of respondent ACA, or with graduates of any of the CCE colleges, or of Dr. Williams' college, or of Sherman;

—The NBCE does not license persons to practice chiropractic, and therefore does not compete with, or act in the same market as, any of the state licensing boards which are members of the alleged co-conspirator Federation of Chiropractic Licensing Boards.

The NBCE thus is not in a horizontal relationship with any of its alleged co-conspirators, or with either of its alleged victims.

The petition does not cite a single case suggesting that the *per se* rule, rather than the rule of reason, would be appropriate in analyzing claims such as those against the NBCE. Indeed, petitioners have cited no cases involving activities such as those of the NBCE at issue here. That makes the lower courts' application of the rule of reason all the more obviously correct, for, as this Court has held, the concept of *per se* illegality is appropriate only in respect of trade practices with which the courts have had considerable experience. *Broadcast Music, Inc. v. Columbia Broadcasting Co.*, 441 U.S. 1 (1979).

In attempting to show that the lower courts were wrong in their analysis of this case, the petition relies most heavily on this Court's decision in *FTC v. Indiana Federation of Dentists*, — U.S. —, 106 S. Ct. 2009 (1986). The NBCE agrees that *Indiana Federation* is a case of great significance to the petition; what it shows is that the lower courts correctly followed the teachings of this Court.

Indiana Federation was a far stronger case for the application of the *per se* rule than is petitioners' case against the NBCE. Entirely unlike the present case, *Indiana Federation* involved horizontal competitors who had engaged in a horizontal agreement which this Court said "resembled practices that have been labeled 'group boycotts.'" (106 S. Ct. at 2017)

This Court held that the *per se* rule should not be applied to the conduct at issue in *Indiana Federation*:

> "Although this Court has in the past stated that group boycotts are unlawful *per se*, see *United States v. General Motors Corp.*, 384 U.S. 127 (1966); *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959), we decline to resolve this case by forcing the Federation's policy into the 'boycott' pigeonhole and invoking the *per se* rule. As we observed last term in *Northwest Wholesale Stationers, Inc. v. Pacific Stationery and Printing Co.*, 472 U.S. —, 105 S. Ct. 2613, 86 L. Ed.2d 202 (1985), the category of restraints classed as group boycotts is not to be expanded indiscriminately, and the *per se* approach has generally been limited to cases in which firms with market power boycott suppliers or customers in order to discourage them from doing business with a competitor—a situation obviously not present here. Moreover, we have been slow to condemn rules adopted by profes-

> sional associations as unreasonable *per se*, see *National Society of Professional Engineers v. United States*, 435 U.S. 679 (1978), and, in general, to extend *per se* analysis to restraints imposed in the context of business relationships where the economic impact of certain practices is not immediately obvious, see *Broadcast Music Inc. v. CBS*, 441 U.S. 1 (1979)." 106 S. Ct. at 2017-18.

When petitioners' claims against the NBCE are viewed in the light of *Indiana Federation*, it is clear that the case does not at all involve the type of activity which this Court would find appropriate for *per se* treatment, and it is clear that the courts below were correct in applying the rule of reason to those claims.

The other case upon which petitioners seem to place heavy reliance—*Klor's Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959)—is not at all relevant. *Klor's* involved an alleged classic horizontal conspiracy among manufacturers and distributors to refuse to deal with a retailer; it has nothing to do with the non-horizontal conduct involved here.[1]

C. The Courts Below Correctly Found that the NBCE's Activities Had No Anti-Competitive Impact in Any Relevant Market.

Petitioners never identified for the district court any relevant market, so that court had to find its own markets

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[1]The petition's discussion of the district court's treatment of *Klor's* (p. i) is highly misleading. The district court did not "squarely hold" that *Klor's* is "no longer good law"; the petition misquotes a remark from the bench during the trial in which the court said that *Klor's* "is not a good case." Neither the court of appeals nor the district court cited *Klor's* in their opinions—with good reason, since the facts of *Klor's* are so far from the facts of the instant case.

—the chiropractic education market and the chiropractic health care services market. The court found that petitioners "have presented no evidence of diminished competition in the chiropractic education market" (Appendix to Petition, p. 18a) and that, as to the chiropractic health care services market, "the evidence does not preponderate in favor of a finding of unreasonable anti-competitive effect." (*Id.* at 25a) The court of appeals' affirmance of those findings was clearly correct as to the NBCE.

Petitioners' principal claim against the NBCE relates to the policy statement, referred to at pp. 3-4 above, which, had it gone into effect, would have precluded Sherman students and graduates from taking the NBCE's examination (because Sherman had decided not to adopt the standards of the only chiropractic accrediting agency recognized by the United States Office of Education). As noted above, however, that policy statement was rescinded before it ever took effect. The net result is that Sherman students and graduates have taken the examination every time it has been offered since Sherman had students far enough along to take it.

The lack of anti-competitive impact is obvious. There was no showing that the stillborn policy statement was unreasonable or anti-competitive.

As part of its effort to avoid the devastating effect of the petitioners' failure to show any anti-competitive impact of the NBCE's (and the other respondents') alleged conduct, the petition states (p. 14):

> "As a result of the foregoing exclusionary conduct, petitioner Sherman cannot attract chiropractic students in sufficient number to remain in business."

The concept that Sherman could not remain in business was never presented to either of the lower courts. No evidence to support it was offered at trial, and it never formed a part of petitioners' trial presentation. Its bald assertion at this point, without any support in the record, is an imposition on this Court and an indication of the weakness of the petition.

In any event, the district court's findings of lack of anti-competitive impact were carefully made by a judge who had sat through ten days of trial which included the presentation of extensive live testimony, the introduction of voluminous documentary evidence and the introduction of the testimony of six witnesses by deposition. Surely it is not the function of this Court, nor the purpose to be served by the issuance of a writ of certiorari, to re-evaluate the evidence presented at trial to see if this Court agrees or disagrees with the conclusions of the district court as affirmed by the court of appeals.

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CONCLUSION

This case presents no issue under the Sherman Act worthy of review. The decisions by the district court and the court of appeals that the rule of reason is applicable to the conduct alleged are fully in line with controlling precedent in this Court. The decision by the district court, affirmed by the court of appeals, that the alleged

conduct was without anti-competitive impact was correct and is in any event not a decision appropriate for this Court's attention. The writ should be denied.

Respectfully submitted,

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